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NO. 89-960

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1989

TIDELAND WELDING SERVICE and
LIBERTY MUTUAL INSURANCE COMPANY
Petitioners

VERSUS

WALTER SAWYER, GLYNN RHODES and
DIRECTOR, OFFICE OF WORKERS
COMPENSATION PROGRAMS, UNITED STATES
DEPARTMENT OF LABOR
Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF ON BEHALF OF RESPONDENTS, WALTER SAWYER AND GLYNN RHODES IN OPPOSITION

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QUESTIONS PRESENTED

I. Did the United States Court of Appeal for the Fifth Circuit err in dismissing petitioner's appeal by ruling the appeal had not been filed timely, pursuant to 33 U.S.C. §921(a) and 20 C.F.R. §802.205(A)(1987)?

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This case is not worthy of the attention of the Supreme Court on certiorari. The case involves no federal question as to which there is a conflict among federal circuit courts. Similarly, the decision of the lower courts in this case do not conflict with any decision of this Court. Finally, no special or important reasons exist that merit, much less compel, review. The petitioners therefore cannot show the case meets any of the applicable criteria for granting certiorari stated in Rule 17 of the Rules of the United States Supreme Court.

STATEMENT OF THE CASE

Respondents, Walter Sawyer and Glynn Rhodes were employees of Tideland Welding Service in 1980. They were welders who were assigned to work at the McDermott Shipyard a shipping and maritime repair-fabrication facility, in Amelia, Louisiana, immediately adjacent to Bayou Bouef, a navigable body of water. They had been employed by Tideland for several months and during that period of time had worked on many different jobs at the McDermott Shipyard. At the time of the incident in question they had been temporarily assigned to work at the McDermott yard on the west bank of Bayou Bouef, repairing and refitting barges.

During respondents' employment at the McDermott facility they had worked on both sides of Bayou Bouef, in the east bank and west bank shipyards of McDermott. On several occasions, in the two month period preceding the incident herein, respondents would begin work on the west bank, and during the day have to drive to the east bank in order to complete their work. To move from the west bank to the east bank, Sawyer and Rhodes would have to use their own car, an would drive on a public highway, U.S. 90. *This road was the only road that connected the east bank yard to the west bank yard.* To get from the west bank to the east bank yard the respondents would have to drive up to U.S. 90 from the west bank yard, cross over the Amelia Bridge which spanned Bayou Bouef and turn into the east bank yard. On the date of the accident this is the exact route taken by Sawyer and Rhodes.

On Saturday, June 21st, 1980, Sawyer and Rhodes were working on the west side of Bayou Bouef in the McDermott yard. Work had been slow that day because of rainy weather, and shortly after 5:00 P.M. they were

advised by the McDermott supervisors to stop work for the day. The supervisors also advised the respondents they would be paid until 6:00 P.M.

Respondents left the west bank yard proceeding in a northerly direction to U.S. 90, which was their common route of exiting the yard. Respondent Rhodes was driving the vehicle, which was owned by Respondent Sawyer. When they reached U.S. 90, they turned right or easterly. They immediately began to ascend the Amelia Bridge which spanned Bayou Bouef. On the descending protion of the bridge and *shortly before* the intersection of U.S. Highway 90 and Louisiana Highway 662, (which was the entrance to McDermott's east bank yard), respondents were involved in an automobile accident in which both were severly injured.

The accident occurred *between the entrances* to the west bank of the shipyard and the east bank of the shipyard on the only road which connects the two entrances, the only road which could by used to travel between the two parts of the shipyard. At the time of the accident the respondents' vehicle had not yet passed the east bank entrance to the shipyard as the vehicle moved in an easterly direction.

In the accident both respondents were severly injured and rendered totally disabled from returning to their former types of work. Since the date of the accident Rhodes had returned to employment on a limited basis but ceased employment in January of 1988 due to his injuries. Sawyer has never returned to gainful employment.

Subsequent to that time, Liberty Mutual Insurance Company bagan payments of compensation, first under the Longshore and Harbor Workers' Compensation Act.

U.S.C. §901 *et seq* (LHWCA) and subsequently under the Louisiana Workers' Compensation Statute L.R.S. 23:1061, *et seq*, until 1983, when petitioner Liberty Mutual Insurance Company unilaterally ceased paying compensation.

Respondents filed claims for compensation with the Department of Labor in 1981, which denied the claim. A full hearing was then held in 1982 before an administrative law judge who also denied the claim.

On the initial appeal to the Benefits Review Board, in a decision rendered May 9, 1984, the Board found the ALJ had erred in his decision *as a matter of law*. The Board fond that certain facts presented at the hearing, established without contradiction by evidence, resulted in the conclusion the location of the accident was an adjoining area to navigable waters customarily used by an employer in repairing or building vessels, and respondents were in the course of their employment at the time of the accident.

Subsequent to the Board's decision, petitioners herein Tideland and Liberty Mutual Insurance Company, filed an appeal with the United States Court of Appeals, Fifth Circuit, which dismissed the appeal because the decision and the order of the Benefits Review Board was not subject to review as a final order. The claim was remanded to the administrative law judge for further consideration of the disability and medical issues. *Tideland Welding Service v. Director, OWCP*, 817 F.2d 1211 (5th Cir. 1987).

At this point, chronologically, the issues before this Court begin to arise.

On *November 25, 1986*, the administrative law judge ruled on the disability issues finding claimant Sawyer was

entitled to weekly benefits of $376.00 per week. Because of the conscious decision by petitioners to not pay the claims during the pendency of the litigation, the decision of the administrative law judge resulted in payments to Sawyer of over $100,000.00 and to Rhodes of over $30,000.00. It is important to note these compensation amounts ordered under the award were unpaid periodic compensation which had accrued.

On *December 3, 1986,* the Benefits Review Board received a petition for stay of the ALJ's decision and award, which it construed as a Notice of Appeal.

On *December 3, 1986,* the claimants filed an unauthorized emergency motion to stay the execution of the ALJ's Decision and Order, with the United States Court of Appeal, Fifth Circuit.

On *December 4, 1986,* the Fifth Circuit granted the unauthorized emergency motion to stay.

On *December 5, 1986,* respondents filed a Motion for Reconsideration with the Administrative Law Judge contending the ALJ's Decision and Order was incorrect. See Appendix A.

On *December 8, 1986,* the Benefits Review Board denied the petitioners' motion for stay and docketed the motion as an appeal of the ALJ's Decision and Order.

On *December 15, 1986,* respondents moved to withdraw their Motion for Reconsideration.

On *December 16, 1986,* the Director, Office of Workers Compensation Programs (OWCP), filed a motion to dismiss the proceedings before the Fifth Circuit.

On *January 6, 1987,* respondents filed a Notice of Appeal with the Benefits Review Board.

On *January 9, 1987,* the Administrative Law Judge granted the respondents' Motion to Withdraw the Motion for Reconsideration.

On *January 13, 1987,* the order granting the withdrawal of the respondents' Motion for Reconsideration was filed.

On *April 22, 1987,* the Benefits Review Board, *sua sponte,* dismissed respondents' appeal as untimely.

On *March 31, 1988,* the Board issued an unpublished final order, upholding the findings of the ALJ's Decision and Order of November 25, 1986. In its decision, the Board rejected all of petitioners' claims, including the constitutional claims.

Subsequently, petitioners appealed this decision to the Fifth Circuit, which dismissed the appeal, finding petitioners' appeal to the Benefits Review Board had been untimely and therefore, it could not appeal that decision.

In the petition for writ of certiorari, petitioner repeatedly characterized respondents' withdrawal of their Motion for Reconsideration as "unauthorized". However, petitioners are unable to cite any statute or regulation to support this contention.

Further, petitioners argue the Fifth Circuit allegedly erred in (1)dismissing the petitioners' appeal by relying on a procedure allegedly unauthorized by the Benefit Review Board's regulation and (2)by refusing to defer to the Board's construction of its regulations.

In fact, it is petitioners who erred in this matter by not being able to follow the regulations and timely file the necessary pleadings in order to preserve its rights under the statutes and procedural regulations of the Benefits Review Board. Petitioners had no qualms about filing an "emergency appeal" on December 3, 1986, to illegally stop the rightful payment of accrued compensation benefits to respondents, although no where in the Federal Rules of Civil Procedure, or the procedural regulations promulgated in the Code of Federal Regulations, is this procedure allowed.

The Fifth Circuit has merely directed the Benefits Review Board to apply its regulations equally to all parties in this matter. Factually, the Fifth Circuit's findings are not clearly erroneous. This Court need not even consider whether the Fifth Circuit erred in some other respect in reversing the Benefits Review Board.

SUMMARY OF ARGUMENT

I. The Fifth Circuit dismissal of petitioners appeal was proper and it correctly concluded the Benefits Review Board failed to abide by its own procedural regulations in allowing petitioners' appeal to the Board although petitioners failed to timely file its Notice of Appeal with the Board. *Tidelands Welding Service and Liberty Mutual Insurance Company v. Walter Sawyer, et al*, 881 F.2d 157 (5th Cir. 1989). Accordingly, the application for certiorari should be denied.

ARGUMENT

I. THE PETITIONERS FAILED TO TIMELY PERFECT ITS APPEAL TO THE BENEFITS REVIEW BOARD, AND THE COURT OF APPEAL CORRECTLY CONCLUDED THIS FAILURE BARRED PETITIONERS' APPEAL TO THE FIFTH CIRCUIT

Failure of a party to litigation to act timely and thus be denied certain remedies is unfortunate. This is especially true where the failure to act timely denies a party the opportunity to present its case on the merits. However unfortunate the procedural misstep which is the crux of the matter at bar, it cannot be ignored at the expense of the rights of another party to the litigation.

Procedural confusion is rampant in this case, as reflected in the facutal recitation, *supra*. But, it must be noted, this confusion was initiated by petitioners, not the respondents.

Petitioners filed an "illegal" or "unauthorized" Emergency Motion for Stay with the Fifth Circuit on December 3, 1986, although this procedure is not recognized or authorized by the Federal Rules of Civil Procedure. It was filed prior to the signing of a "final order" from the Benefits Review Board; a "final order" being a predicate act required by 33 U.S.C. §921(c), which provides in pertinent part:

> "Any person adversely effected or aggrieved by a final order of the Benefits Review Board may obtain a review of that order in the United States Court of Appeal for the circuit in which the injury occurred by filing in such court within sixty (60) days following the issuance of such board order a written petition praying that they ought to be modified or set aside."

The Fifth Circuit recognized petitioners' efforts to circumvent the applicable rules and regulations, albeit six months after the unauthorized motion was filed, and ultimately dismissed the appeal, noting petitioners had an "obligation to await a final decision before appeal..." *Tidelands Welding Service v. Director, Office of Workers' Compensation Programs, et al,* 817 F.2d 1211, 1212 (5th Cir. 1987).

Because of this unauthorized "Emergency Motion to Stay", respondents were forced to wait an additional seven months before they were paid the accrued compensation awarded to them by the Administrative Law Judge.

Further, petitioner compounded the confusion by filing the Motion for Stay with the Benefits Review Board at the same time the unauthorized Motion for Stay was filed with the Fifth Circuit. Now petitioners inferentially complain respondents engaged in an unauthorized activity which has cause petitioners to lose its right to appeal. nothing could be further from the truth. If fact, it was petitioners' lack of diligence which led to its current predicament.

The regulations in question, 20 C.F.R. §802.205 is jurisdictional, and like the parallel provisions of Federal Rules of Appellate Procedure 4(a)(4), it must be applied as it is written.

Respondents filed a timely motion for reconsideration before the ALJ. This motion conformed to all rules and regulations in reciting respondents' specific objections to the ALJ's Decision and Order. As per 20 C.F.R. §802.205A(a), this motion

> shall suspend the running of the time for filing a notice of appeal,

and further,

> [i]f a timely motion for reconsideration of [an ALJ's decision and order] is filed, any appeal to the Board, whether filed prior to or subsequent to the filing of the timely motion for reconsideration, shall be dismissed as premature. Following final action by the administrative law judge...a new notice of appeal shall be filed with the Clerk of the Board by any party who wishes to appeal.

20 C.F.R. §802.205A(e).

Respondents filed a timely motion for reconsideration thereby fulfilling the only requirement of the regulations. Therefore, an appeal filed before this time was premature and "shall" be dismissed.

However, the Board chose to ignore its own rules, and in its order of April 22, 1987, dismissed respondents' appeal because it was filed "prior to the administrative law judge's Order on the Motion." Order of Benefits Review Board, *see* Appendix A, p. 5, Writ for Certiorari filed by Petitioners.

This resulted in the anomalous situation of petitioners being allowed to proceed with its appeal, although obviously filed prematurely, while respondents, who also filed their appeal prematurely, being denied the right to proceed with their appeal.

The Fifth Circuit's decision below did nothing more than correct the Benefit Review Board's misstatement of the regulations.

This Court has reviewed a factually similar situation to the one at issue in *Griggs v. Procident Consumer Discount Co.*, 459 U.S. 56, 103 S.Ct. 400, 74 L.Ed.2d 225

(1982), although F. R. App. Proc. Rule 4(a)(4) was interpreted.

The Court in *Griggs* held the lack of jurisdiction resulting from the prematurity of an appeal notice, pursuant to F. R. App. Pro. Rule 4(a)(4), cannot be ignored, even though it may deprive a party of the opportunity for review. Under F. R. App. P. Rule 4(a)(4), as under 20 C.F.R. §802.205A(a) and (e), a prematurely filed motion for appeal is

> not merely defective; it [is] a nullity. Under the plain language of the...Rule, a premature notice of appeal "shall have not effect"; a new notice of appeal "must be filed." In short, it is as if no notice of appeal were filed at all...It is well settled that the requirement of a timely notice of appeal is " 'mandatory' and jurisdictional.' "

Griggs, supra, 459 U.S. at 61; (citations omitted).

The Board's regulation established precisely the same rule concerning motions for reconsideration before the ALJ. These regulations are also "mandatory and jurisdictional" and lead to the same result - dismissal of any and all premature appeals.

There is no justification for the Board accepting petitioners' appeal below while rejecting respondents', even under the Board's theory as posited in its Order of April 22, 1987. Appendix "A", Writ of Certiorari filed by Petitioners. By filing and then withdrawing a motion for reconsideration, respondents did not "potentially [render petitioners'] appeal premature and subject to dismissal." Appendix "A", p. A-5, Writ of Certiorari filed by Petitioners. Rather, the timely *filing* of the motion for reconsideration mandated dismissal of the appeal.

In its reasoning, the Board misses the point. The fact petitioners were precluded from filing an appeal pursuant to 33 U.S.C. §921 arose not because of respondents' withdrawal of its motion for reconsideration, but rather from petitioners' own failure to read the regulations and file a new appeal within 30 days of the January 13, 1987 order of the ALJ, as directed by 20 C.F.R. §802.205(e).

Throughout its brief, petitioners imply some devious or ulterior motive on the part of respondents in thier "unauthorized" withdrawal of the motion for reconsideration. Nothing in the record evinces any motivation by respondents other than to protect their right to compensation, something petitioners have fought to delay or deny for almost 10 years. Respondents did not need to have the ALJ's 1986 decision reconsidered under 20 C.F.R §802.205A as relief is also available under 33 U.S.C. §922.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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